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No. 73-642

Supreme Court, U. S.
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Supreme Court of the United States

October Term 1973

EMPIRE CONSTRUCTION INC.,
an Oklahoma corporation
Petitioner

VERSUS

CITY OF TULSA, OKLAHOMA
a municipal corporation
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTION PRESENTED

(1) Whether the adoption by the Respondent by resolution of a Tulsa Metropolitan Area Expressway Plan constitutes a "taking" of private property for a public use in contravention of the Oklahoma Constitution, Article 2, Section 24, and the United States Constitution, Article V.

REASONS FOR DENYING THE WRIT

(1) The Federal question herein presented has previously been determined by this Court.

The question of "plans" by a condemning authority constituting a "taking" is an ancient question which has previously been determined by this Court.

In the case of *Willink v. United States*, 240 U.S. 572, 60 L.Ed. 808, 36 S.Ct. 422, Willink sued to recover damages for an alleged taking of this property in the improvement of the harbor in the Savannah River at Savannah, Georgia. On May 4, 1889, the United States established a harbor line in such a manner that a part of Willink's land was brought within the harbor area. In 1890 a project was approved by Congress to cut away a portion of Willink's land. A contract was made, but the work was never done or undertaken. The Court of Claims denied recovery and this Court affirmed the judgment, stating:

> "Upon these facts, as before indicated, the court (Court of Claims) held that he (Willink) was not entitled to recover.
>
> We reach the same conclusion, and for the following reasons:
>
> There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a

> harbor line across the land was required to take it from him and appropriate it to public use. (Citations omitted).

In *Danforth v. United States*, 308 U.S. 271, 74 L.Ed. 240 (1939), the question arose as to the date of "taking". Danforth alleged that the date of "taking" was the enactment of legislation.

> This Court stated in the *Danforth* case that:
>
> "Condemnation is a means by which the sovereign may find out what any piece of property will cost. 'The owner is protected by the rule that title does not pass until compensation has been ascertained and paid . . .' A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense . . . The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified or appropriations may fail."

Finally, in the case of *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153 (1969), Reservation asserted that their property should be treated as a single unit, irrespective of alleys dividing their property into sections. The District of Columbia had refused to close the alleys upon application made by Reservation prior to the condemnation suit, because the center leg of the inner city freeway was to go through the alleys under plans which were being considered.

This Court stated in the *Reservation* case, supra, at page 157, as follows:

> "We conclude by pointing out that general plans affecting market value, especially when they depend on a positive grant or exchange from the government are not a "taking" subject to compensation under the Fifth Amendment.
>
> The fact that future governmental needs may operate to prevent an alley closing now does not mean the government must compensate for this lost value on condemning the property. 'The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principles of indemnity to the landowner.' In general there is room for the doctrine that the government cannot use the threat of eminent domain to drive down established market values. But in making this balance, not all effects of government action or plans on value can be compensated.
>
> The announcement or even internal consideration of general government planning, long before any condemnation activities, may have an effect on value of lands involved, sometimes a beneficial, sometimes an adverse effect. That the effect, is adverse does not mean the government is required to compensate affected landowners for possible decreases in their land value when it comes to select specific properties for its project."

From an examination of these authorities one can see that this Court has specifically held that general plans

affecting market value are not a taking subject to compensation under the Fifth Amendment.[1]

Highway construction is an expensive and time-consuming project. In order to have any beneficial use, plans must be made to tie in to federal, state, county and city projects. Plans are necessary to estimate costs of right-of-way and construction. For today's voter, plans are necessary to sell the taxpayer on the project so bonds can be voted and issued. During this process of developing the project, plans can be changed or cancelled entirely.

Thus, in the case at bar, the Riverside Expressway was never constructed. The Oklahoma State Department of Highways has dropped this project from its plans and no funding is available for right-of-way or construction.

Empire Construction Company's situation is not materially different from the facts previously presented to this Court.

(2) The Empire Construction Company petition does not present any question which shows a change in conditions requiring a review of existing law.

The question presented herein is as old as the

[1] *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153 (1969).

sovereign's power of eminent domain. The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principles of indemnity to the landowners.[2]

In Oklahoma alone, there are thousands of miles of expressways "planned" by various authorities. To require the condemning authority to compensate the landowner solely on the basis of an adoption of a plan would do one of two things. It would either stop planning, or it would force the condemnor to formulate its plans in secret without citizen input. Either of these results would not be in the best interests of the public.

The conditions under which this Court has held that general plans affecting market value are not a "taking" subject to compensation under the Fifth Amendment have not changed to warrant a re-examination of the federal question.[3]

CONCLUSION

The city of Tulsa has not actually "taken" or imposed any retraints upon Petitioner's land which would deny him the use of his property. The question presented

[2]*United States ex rel for Use of TVA v. Powelson*, 319 U.S. 266, 280, 63 S.Ct. 1047, 1055 (1943).

[3]*Reservation Eleven Associates v District of Columbia*, supra.

has previously been ruled on by this Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari were delivered to:

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404 South Boston
Tulsa, Oklahoma

this _____ day of October, 1973.

David Nelson